

CH. 43
ROBBERY

- §43-1 [Generally \(CumDigest\)](#)
- §43-2 [Proof of Dangerous Weapon \(CumDigest\)](#)
- §43-3 [Aggravated Robbery \(CumDigest\)](#)
- §43-4 [Vehicular Hijacking \(CumDigest\)](#)

[Top](#)

§43-1

Generally

[People v. Taylor, 101 Ill.2d 508, 463 N.E.2d 705 \(1984\)](#) A witness testified that he heard two shots while he was in an elevator in an apartment complex. When he left the elevator he saw the body of the victim lying near the stairs. He then saw the defendant come down the stairs, bend over the victim's body, and appear to remove the victim's watch and something from the victim's pocket. However, the witness did not actually see anything taken. The defendant stood and pointed a gun at the witness, and the witness ran. There was evidence that the victim owned a wallet and watch and had been paid on the day of the incident. The Court held that this evidence was not sufficient to prove armed robbery. There was no evidence that the victim possessed money or a watch when he entered the premises, and the witness's testimony "offers little support for the theory that anything was taken from him."

[People v. Lewis, 165 Ill.2d 305, 651 N.E.2d 72 \(1995\)](#) After defendant stabbed the decedent during an argument, he removed a key from the decedent's pocket so he could operate a deadbolt and leave the apartment. The Court found that because robbery is a general intent crime, it does not require proof that the defendant specifically intended to take property by force. The Court held that a robbery conviction is proper even without any showing that the defendant intended to commit that offense. The Court also rejected defendant's argument that he should not have been convicted because the removal of the keys occurred after the decedent's death, and was not accomplished by the threat or use of force. Because the stabbing and the taking of the keys were essentially "a single series of continuous acts," and the evidence established "some concurrence" between the use of force and the removal of the keys, the fact that the decedent had been "reduced to a state of physical non-resistance" when the keys were taken did not preclude a robbery conviction.

[People v. Wiley, 165 Ill.2d 259, 651 N.E.2d 189 \(1995\)](#) The decedents' bodies were found near an open purse that had its contents removed and thrown on a table. One of the victims had a purse wrapped around her neck, and clothes and other items from dressers were also thrown about the rooms. Although coins were found at the scene, no paper currency was found. Defendant argued that he should not have been convicted of armed robbery because the State introduced no evidence that any property had been taken from the decedents. The Court rejected this argument, holding that "it was not unreasonable for the jury to infer that the victims had been in possession of money, whether paper or coin currency, which was no longer found at the scene and had been taken by the defendant during the course of a robbery. . . . Based upon the presence of coin money in the apartment, the condition of the women's purses and their other belongings, the state of the apartment, and the defendant's statement that he had gone to the apartment in order to rob the victims, the circumstantial evidence was sufficient for a rational trier of fact to find all of the essential elements of armed robbery."

[People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289 \(1980\)](#) The Supreme Court rejected defendant's contention that the property was not taken "from the person or presence of" the victim. To constitute robbery under the "presence" theory, the property must have been in the presence or control of the victim, and the victim must have parted with the property because of force or the threat of force. Thus, the "offense of robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will." Here, defendant telephoned a store manager and threatened to set off bombs in the store unless the manager took a certain amount of money to a particular location. The manager took the money to the location and returned to his store. The defendant then picked up the money. Since the money was in the actual control and presence of the store manager and he was compelled to give it up by the defendant's

threat of force, the elements of robbery were present.

[People v. Kidd, 175 Ill.2d 1, 675 N.E.2d 910 \(1996\)](#) Defendant was convicted of armed robbery for taking a watch from one of the victims of a murder. He argued that the conviction was improper because the prosecution failed to prove that he used force or the threat of force as a means of taking the watch. Defendant argued that the evidence showed only that he took the watch as an afterthought, after the victim had been killed. The Court rejected defendant's argument, noting that it had rejected a similar argument in [People v. Strickland, 154 Ill.2d 489, 609 N.E.2d 1366 \(1992\)](#). "If, as the result of a quarrel, a fight occurs in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes the money of the vanquished one, the offense committed is robbery."

[People v. Owens, 102 Ill.2d 145, 464 N.E.2d 252 \(1984\)](#) Defendant was convicted of armed robbery and contended that the trial court erred in refusing to instruct the jury on simple robbery. Defendant pointed to testimony that when he demanded the money from the victim, he did not have any weapon in his hand. The defense argued that based on this evidence, the jury could have believed that defendant used the weapon only to prevent the victim from stabbing him. The Court rejected this contention, holding that the armed robbery statute only requires that the weapon be carried "on or about" the person, without regard to its use or the stage of the occurrence when it is acquired.

[People v. Gaines, 88 Ill.2d 342, 430 N.E.2d 1046 \(1981\)](#) Defendant entered a room with a gun and announced a "stick-up." The victim took two dollar bills from his pocket and dropped them to the floor. After defendant left, only one of the bills could be found. Defendant contended that the evidence was insufficient to prove robbery because it failed to show that defendant took physical possession of the money dropped by the alleged victim. The Court held that the offense of robbery is complete when force or threat of force "causes the victim to part with possession or custody of property against his will." Thus, the robbery was complete when the alleged victim dropped the money to the floor, whether or not defendant picked up the bills and took them away.

[People v. Patton, 76 Ill.2d 45, 389 N.E.2d 1174 \(1979\)](#) The "simple taking" or "snatching" of a purse from the fingertips of an unsuspecting possessor is not sufficient force or threat of force to constitute robbery. When an article is taken "without any sensible or material violence to the person, as snatching a hat from the head or a cane from the hand the offense will be theft from the person rather than robbery." See also, [People v. Thomas, 119 Ill.App.3d 464, 456 N.E.2d 684 \(2d Dist. 1983\)](#).

[People v. Bowel, 111 Ill.2d 58, 488 N.E.2d 995 \(1986\)](#) The defendant was convicted of robbery for taking a purse. The Court upheld the conviction, rejecting the contention that the offense was a simple "purse-snatching" with insufficient physical force to constitute robbery. Although the Court noted that the snatching of a purse is not in itself sufficient force to constitute robbery, it held that more than a simple "snatching" occurred here where the defendant grabbed the victim and forcibly pushed her.

[People v. Taylor, 129 Ill.2d 80, 541 N.E.2d 677 \(1989\)](#) The victim was at an outdoor telephone when defendant crossed the street and snatched a necklace from her neck. The defendant stared at the victim for about 10 seconds and then walked away. The victim testified that she was scared when defendant took the necklace, and even more scared by the way he stared at her. The Court found that because the victim's "necklace was attached to her person in such a way that it offered resistance to anyone who would take it without permission . . . [d]efendant had to use force sufficient to overcome this resistance in order to successfully take the necklace." Thus, defendant's actions constituted "force" within the meaning of the robbery statute.

[People v. Green, 225 Ill.2d 612, 870 N.E.2d 394 \(2007\)](#) "Robbery" and "robbery of a person 60 years of

age or older” are not distinct crimes. Instead, Illinois has a single offense of robbery that is either a Class 1 or Class 2 felony, depending on the age of the victim. Even when charged as a Class 1 felony because of the victim’s age, the name of the offense remains “robbery.” Where the jury was properly instructed concerning the elements of the offense of robbery of a person aged 60 or older, a verdict form finding defendant guilty only of “robbery” was adequate to convict defendant of robbery of a person over the age of 60.

[**People v. Walden**, 199 Ill.2d 392, 769 N.E.2d 928 \(2002\)](#) The proportionate penalties clause was violated by the 15-year enhancement for armed robbery while in possession of a firearm. The court found that with the mandatory enhancement, armed robbery while in possession of a firearm carries a higher sentence than the more serious offense of armed violence predicated on aggravated robbery. Accord, [**People v. Blanco**, 199 Ill.2d 410, 770 N.E.2d 214 \(2002\)](#); [**People v. Devenny**, 199 Ill.2d 398, 769 N.E.2d 942 \(2002\)](#).

[**People v. Cackler**, 317 Ill.App.3d 645, 740 N.E.2d 399 \(1st Dist. 2000\)](#) The gist of armed robbery is taking another’s property by force or threat of force. The use of force or threat of force need not occur before or during the time the property is taken, so long as there is some concurrence between the threat of force and the taking of the property. The necessary concurrence between the threat of force and taking of property did not occur where the defendant killed the decedent, took a bath, went to a grocery store to buy plastic bags, and only then removed the decedent’s jewelry and money to make it appear that he had been killed in a robbery. Not only did a substantial period of time pass between the murder and removal of the property, but the defendant’s motivation for taking the property was to conceal his involvement in the murder.

[**People v. Derr**, 346 Ill.App.3d 823, 806 N.E.2d 237 \(5th Dist. 2004\)](#) The gist of robbery is taking another’s property by force or threat of force. The use or threat of force need not necessarily occur before or as the property is taken, so long as there is some “concurrence” between the force and the taking of the property.

[**People v. Runge**, 346 Ill.App.3d 500, 805 N.E.2d 632 \(3d Dist. 2004\)](#) Defendant, who was committed to the Department of Human Services under the Sexually Violent Persons Commitment Act used pepper spray to escape while being transported to a court hearing. Although the State need not show that force was exerted for the purpose of taking the property, robbery occurs only if there is “some concurrence” between the force and the taking of the property. Where the taking and force are part of a single series of continuous acts, a conviction for robbery will stand. The court concluded that where the defendant was issued DHS clothing several hours before he used pepper spray to escape from two guards, and the force was used to escape rather than to gain possession of the clothing, the evidence did not establish the required “concurrence” between the use of force and the taking of the clothing. Defendant’s conviction for armed robbery was reversed.

[**People v. Hollingsworth**, 120 Ill.App.3d 177, 457 N.E.2d 1062 \(5th Dist. 1983\)](#) The defendant and a man named Hawkins entered the office of a teacher who had cash and checks on her desk. As they were talking, Hawkins moved around the desk and picked up the cash and checks. The teacher testified that as defendant moved toward the desk, she saw the handle of a gun tucked in his jeans. She also testified that she did not attempt to stop defendant because she was afraid of the weapon. The Court found that the presence of the gun in defendant’s jeans was sufficient to establish a threat of force. “It is difficult to overestimate the coercive power of a deadly weapon; once its presence is indicated to the victim, nothing more need be communicated to the victim in order to generate a sense of terror.

[**People v. Simpson**, 178 Ill.App.3d 1091, 534 N.E.2d 217 \(3d Dist. 1989\)](#) Defendant entered the victim’s residence while wielding a knife with a six-inch blade and asked the victim if he (defendant) could cut the victim’s grass. The victim said no, and defendant asked if the victim could give him change for a dollar. The victim took his wallet from his pocket and handed it to defendant. After taking three \$20 bills, defendant

lunged at the victim with the knife. The victim blocked the blow, cutting his hand, and defendant kicked at the victim as he fled. The Court held that where a weapon is displayed, neither menacing language nor implied threats to use the weapon are required. Furthermore, sufficient force to sustain the robbery may be found where the defendant's departure was accompanied by force, as in this case. See also, [People v. Kennedy, 10 Ill.App.3d 519, 294 N.E.2d 788 \(4th Dist. 1973\)](#) (conviction for robbery may be sustained when the defendant used force to accomplish his departure).

[People v. Robinson, 92 Ill.App.3d 397, 416 N.E.2d 65 \(1st Dist. 1981\)](#) Defendant could not be convicted of armed robbery where the alleged victim testified that no money was taken from her. Although another cardplayer testified that defendant took money from all the players, including the complainant, "it would be unreasonable to determine that the vague generalities [of another cardplayer] in describing the crime merit greater credibility than the testimony of the victim herself, which was quite specific. . ."

[People v. Duckins, 59 Ill.App.3d 96, 375 N.E.2d 173 \(2d Dist. 1978\)](#) The jury may be instructed on the unexplained possession of recently stolen property at a trial for armed robbery but the inference arising from possession of recently stolen property, standing alone, is insufficient to prove robbery. [People v. Williams, 145 Ill.App.3d 482, 495 N.E.2d 1201 \(1st Dist. 1986\)](#).

[People v. Talley, 177 Ill.App.3d 170, 531 N.E.2d 1139 \(4th Dist. 1988\)](#) The Court held the jury need not be instructed on a mental state for the offense of robbery. The commission of a general intent crime necessarily implies intent or knowledge. See also, [People v. Childrous, 196 Ill.App.3d 38, 552 N.E.2d 1252 \(4th Dist. 1990\)](#).

Cumulative Digest Case Summaries §43-1

[People v. Clark, 2016 IL 118845 \(No. 118845, 3/24/16\)](#)

1. A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

2. The State charged defendant with aggravated vehicular hijacking while armed with a firearm ([720 ILCS 5/18-4\(a\)\(4\)](#)) and armed robbery while armed with a firearm ([720 ILCS 5/18-2\(a\)\(2\)](#)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon "and will be treated as such." The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

3. Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or (2) a dangerous weapon other than a firearm. [720 ILCS 5/18-2\(a\)\(1\)](#), (2); [720 ILCS 5/18-4\(a\)\(3\)](#), (4).

The Illinois Supreme Court held that it "would have to stretch plain meaning and common understanding beyond a semblance of reason" to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

4. Although defendant did not object to this error, the Supreme Court found that it was cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice

against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court's actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court's judgment reducing defendant's convictions to vehicular hijacking and robbery and remanding the case for resentencing.

(Defendant was represented by Assistant Defender Gil Lenz, Chicago.)

People v. Washington, 2012 IL 107993 (No. 107993, 2/17/12)

1. Prior to 2000, the Criminal Code provided that the offense of armed robbery is committed while armed with a dangerous weapon. Effective January 1, 2000, the statute was amended to create substantively distinct offenses based on whether the offender is armed with a dangerous weapon other than a firearm, or with a firearm. The sentencing enhancements of the amended version were held unconstitutional prior to the commission of the offenses in 2004 with which defendant was charged. [People v. Walden, 199 Ill.2d 392, 769 N.E.2d 928 \(2002\)](#); [People v. Moss, 206 Ill.2d 503, 795 N.E.2d 208 \(2003\)](#). That holding was overturned prior to defendant's trial in 2006. [People v. Sharpe, 216 Ill.2d 261, 839 N.E.2d 492 \(2005\)](#).

Based on its belief that the pre-amended version of the statute had come back into force with the decisions in [Walden](#) and [Moss](#), the State charged defendant with armed robbery under the pre-amended version of the statute with having committed the offense while "armed with a dangerous weapon, to wit: a firearm." Defendant made no objection to the indictment.

The court found that there was no variance, fatal or otherwise, between the proof at trial that defendant was armed with a gun and the charge that he was armed with a dangerous weapon. The State charged that defendant committed the offense with a dangerous weapon and was required to prove that he committed the offense with a dangerous weapon. The jury was instructed that it had to find that defendant was armed with a dangerous weapon to convict. The State proved that defendant committed the offense with a dangerous weapon—a gun.

2. The State charged defendant with the offense of armed robbery while armed with a "dangerous weapon, to wit: a firearm." It sustained its burden of proving that defendant used a gun as a dangerous weapon during the commission of the offense. A witness who had an unobstructed view of the weapon defendant had in his possession testified that it was a gun and also testified that defendant held the gun to his head. The jury could reasonably infer from this evidence that the defendant possessed a real gun.

The court distinguished [People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 \(2008\)](#). There, the evidence at trial was that defendant was armed with a small BB gun and there was no evidence of its weight or composition. As it could not be inferred from this evidence that the BB gun could have been used as a bludgeon, the evidence precluded a finding that the BB gun was a dangerous weapon.

3. Kilbride, C.J., dissented and Theis, J., joined the dissent. Only the sentencing enhancements of the amended statute were struck as unconstitutional. The substantive provision of the amended statute defining the elements of the offense remained intact. Defendant could not be prosecuted under the pre-amended version of the statute. Defendant could be convicted only of being armed with a dangerous weapon other than a firearm, or with a firearm. Because the State limited its argument on appeal to the dangerous-weapon prong of the statute, the issue was whether the State proved that defendant was armed with a

dangerous weapon other than a firearm. There was no evidence at trial that defendant was armed with a non-firearm dangerous weapon.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Barnett, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2011) (No. 3-09-0721, 6/27/11)

A person commits armed robbery when he commits a robbery and (1) carries on or about his person or is otherwise armed with a dangerous weapon other than a firearm; or (2) carries on or about his person or is otherwise armed with a firearm. [720 ILCS 5/18-2\(a\)\(1\) and \(a\)\(2\)](#). These two subsections are mutually exclusive and neither is a lesser included of the other. A violation of subsection (a)(1) is a Class X felony, while a violation of subsection (a)(2) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. [720 ILCS 5/18-2\(b\)](#). The sentences for armed robbery are not enhanced by special findings determined by the trial of fact. Rather, the minimum sentence for armed robbery is determined by the statutory elements set out in the applicable subsection.

The State charged defendant with a violation of subsection (a)(2) in that he committed a robbery “while armed with a dangerous weapon, a handgun.” Both parties declined to request that the jury be instructed on any lesser-included offense, although there was a question of fact as to whether defendant might have been armed with a BB gun. Without objection, the jury was instructed that defendant was charged with armed robbery with a firearm, but both the definitional and issues instructions informed the jury that to convict defendant it need only find that defendant was armed with a dangerous weapon. Over defense objection, the jury was also asked to make a special finding regarding whether defendant was armed with a firearm. The jury found defendant guilty of armed robbery, but found that the State had not proved defendant was armed with a firearm. The court sentenced defendant to 17 years’ imprisonment for a violation of subsection (a)(2) (firearm).

The court concluded that notwithstanding the hybrid language employed in the indictment (referencing both a dangerous weapon and a handgun), the State intended to charge defendant with a violation of subsection (a)(2) (firearm). Since subsections (a)(1) and (a)(2) are mutually exclusive, the court could not direct the circuit court to enter a conviction for a violation of subsection (a)(1) (dangerous weapon) as a lesser-included offense. It declined to exercise its authority pursuant to Supreme Court Rule 615(b)(3) to reduce the degree of defendant’s conviction to any lesser offense because both sides had elected to proceed with an all-or-nothing approach at trial. “Further, once the jury found that the State did not prove a required element of a violation of §18-2(a)(2) related to the use of a firearm, this court cannot *create* a conviction for that specific statutory violation in order to subsequently reduce that armed robbery conviction to simple robbery.”

Enforcing the jury’s special finding that the State did not prove a necessary element of the only indicted offense, the court reversed the armed robbery conviction.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Daniel, 2014 IL App (1st) 121171 (No. 1-12-1171, 5/22/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the plain-error doctrine.

The plain-error doctrine permits a reviewing court to consider a forfeited error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant’s trial and the integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. The second prong did not apply because Illinois courts have narrowed this prong to errors that are structural:

systemic errors that erode the integrity of the judicial process and undermine the fairness of trial. Although the jury instructions misstated the law, they did not fall within the class of errors deemed structural.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Davis, 2015 IL App (1st) 121867 (No. 1-12-1867, 1/20/15)

Defendant argued that his convictions and sentences for armed robbery in 1985 violated the proportionate penalties clause since, based on the facts of his case, armed robbery had the identical elements as armed violence with a category II weapon, but armed robbery was a Class X felony, while category II armed violence was a Class 2 felony.

In 1985, the Class X offense of armed robbery was defined as committing robbery while armed with a dangerous weapon. [Ill. Rev. Stat. 1985, ch. 38, ¶18-2\(a\), \(b\)](#). Armed violence was defined as committing any felony while armed with a dangerous weapon. [Ill. Rev. Stat. 1985, ch. 38, ¶ 33A-2](#). If the dangerous weapon was a category I weapon, including firearms, the offense was a Class X felony. [Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1\(b\), 33A-3\(a\)](#). If, however, the dangerous weapon was a category II weapon, such as a bludgeon, the offense was a Class 2 felony. [Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1\(c\), 33A-3\(b\)](#).

Defendant argued that the juries in his cases were never asked to identify the dangerous weapons used during the offenses and there was no evidence the weapons met the statutory definition of a firearm. Accordingly, the dangerous weapons used in his cases were category II weapons, such as bludgeons. And if this were the case, his sentences for armed robbery violated the identical elements test.

The court rejected this argument. The trial records showed that the main issue in each case was whether the weapon was a real or toy gun. Defendant argued that the weapons were toy guns, not dangerous weapons. The court concluded that by finding defendant guilty, the juries rejected defendant's arguments that he was only armed with toy guns and thereby implicitly found that the weapons were real guns. Defendant's armed robbery convictions thus may not be properly compared to armed violence with a category II weapon. The sentences did not violate the identical elements test.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

1. Whether a crime is a lesser-included offense is determined by the "charging instrument" test, which permits conviction of an uncharged offense if: (1) the instrument charging the greater offense contains the broad foundation or main outline of the lesser offense, and (2) the evidence rationally supports a conviction on the lesser offense. The latter question is to be considered only after it is determined that the uncharged crime is a lesser-included offense.

2. A charge may set forth the broad foundation or main outline of the lesser offense even if it does not contain every element of the lesser offense, so long as the missing element can be reasonably inferred. Here, defendant was charged with armed robbery for knowingly taking currency from the person or presence of the complainant by the use of force or by threatening the imminent use of force while being armed with a firearm. The complainant testified that defendant pointed a firearm at him, but no weapon was recovered and the State did not produce a firearm at trial.

The trial court found that the evidence was insufficient to establish that the item which defendant displayed was a firearm. However, the judge entered a conviction for aggravated robbery. Aggravated robbery occurs when a person commits robbery while indicating verbally or by conduct that he or she is armed with a firearm, even if it is later determined that there was no firearm.

The Appellate Court concluded that the armed robbery charge alleged the broad outline of aggravated robbery. The court found that the allegation that defendant took property "by the use of force or by threatening the imminent use of force" while armed with a firearm provided a basis to reasonably infer that the defendant indicated either verbally or by his actions that he was armed. Thus, aggravated robbery was a lesser included offense of armed robbery.

3. The court concluded, however, that the evidence was insufficient to justify a conviction for aggravated robbery. The only evidence showing that defendant indicated that he was armed was the complainant's testimony that defendant displayed an item which the trial court found not to be a firearm. "The trial court did not find the victim's testimony about a firearm credible enough to conclude that defendant frightened him with a firearm, and thus the evidence was also insufficient for aggravated robbery."

4. The court reached the issue as second-stage plain error, finding that the entry of a conviction on a crime which is not a lesser-included offense violates the fundamental right to notice of the charges and affects the fairness of the trial and the integrity of the judicial process.

Defendant's conviction for aggravated robbery was reduced to simple robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

[People v. Ware, 2014 IL App \(1st\) 120485 \(No. 1-12-0485, 3/14/14\)](#)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the second prong of the plain-error doctrine.

Errors under the second prong are presumptively prejudicial and require automatic reversal only if they are structural, i.e., systemic errors that serve to erode the integrity of the judicial process and undermine the fairness of the trial. A jury instruction error is plain error only when it creates a serious risk the jurors incorrectly convicted defendant because they did not understand the applicable law.

The instructions here misdescribed an element of the offense by referring to a "dangerous weapon," rather than a "firearm." But a firearm is still a class of dangerous weapon, and the jury's verdict, based on substantial evidence that defendant carried a firearm, implicitly found that defendant was armed with a firearm. The error thus did not create a substantial risk that the jurors incorrectly convicted defendant because they did not understand the applicable law.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

[People v. Watt, 2013 IL App \(2d\) 120183 \(No. 2-12-0183, 11/21/13\)](#)

The armed robbery statute was amended in 2000 to create substantively different offenses, armed robbery with a dangerous weapon other than a firearm, and armed robbery with a firearm. [720 ILCS 5/18-2\(a\)\(1\), \(a\)\(2\)](#).

Defendant was charged with armed robbery committed with a firearm. It was error for the court to instruct the jury that it could convict defendant of armed robbery based on his being armed with a dangerous weapon, where armed robbery with a dangerous weapon no longer exists under the current statute. Although the instruction was authorized by IPI, it does not correctly state the law and should no longer be given. The instructions should be modified to reflect the current state the law.

The Appellate Court affirmed, finding that the error did not amount to plain error.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

[Top](#)

§43-2

Proof of Dangerous Weapon

[People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 \(2008\)](#) A person commits armed robbery by committing robbery while armed with a dangerous weapon. Illinois law does not create a mandatory presumption that any weapon is dangerous; however, the trier of fact may infer dangerousness from evidence that a firearm

is loaded and operable, was used as a bludgeon, or was capable of being used as a bludgeon. Where the State's evidence showed only that the petitioner had a small, portable and concealable weapon, an officer testified that police recovered a pellet gun with a 3-inch barrel, the State presented neither the weapon nor photographs of it at the trial, and there was no evidence that the gun was loaded or used as a bludgeon or regarding its weight or composition, the Appellate Court properly concluded that the evidence failed to show that defendant used a dangerous weapon.

[People v. Skelton, 83 Ill.2d 58, 414 N.E.2d 455 \(1980\)](#) The Court discussed the meaning of the phrase "dangerous weapon" under the armed robbery statute, and held that the defendant could not be convicted of armed robbery for committing a robbery while armed with a toy pistol. Because of their size and weight, real guns can be used in a deadly fashion as bludgeons. Thus, they "can properly be classified as dangerous weapons although they were not in fact used in that manner during the commission of the particular offense." In most cases, whether an object is a dangerous weapon is a question for the trier of fact to decide based on whether the particular object is susceptible to use in a manner likely to cause serious injury. However, where the "character of the weapon is such as to admit of only one conclusion, the question becomes one of law for the court." As a matter of law, the toy gun used in this case was not a dangerous weapon. The Court found that the gun could not "fire blank shells or give off a flash," and was "too small and light in weight to be used as a bludgeon." See also, [People v. Greer, 53 Ill.App.3d 675, 368 N.E.2d 966 \(5th Dist. 1977\)](#) (a gun is presumed to be dangerous unless defendant presents evidence that it is not); [People v. Martinico, 101 Ill.App.3d 250, 427 N.E.2d 1340 \(4th Dist. 1981\)](#) (pellet gun that could be used as a bludgeon was properly found to be a dangerous weapon.)

[People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 \(1978\)](#) The Supreme Court rejected defendant's contention that a fingernail clipper was not a "dangerous weapon." The Court noted that the clipper "contains a sharp, pointed fingernail file," and that under the circumstances of this case "the nature of the weapon and its potential for doing harm were questions of fact for the jury to decide."

[People v. Thorne, 352 Ill.App.3d 1062, 817 N.E.2d 1163 \(1st Dist. 2004\)](#) Although the armed robbery statute does not define the term "dangerous weapon," case law divides objects that are alleged to be "dangerous weapons" into four categories: (1) those which are dangerous *per se* (such as knives and loaded guns); (2) those which are never dangerous weapons (such as plastic toys); (3) those which are not necessarily dangerous weapons but can be so used (such as an unloaded gun or a toy gun made of heavy metal and which can be used as a bludgeon or a dangerous weapon); and (4) those which are not necessarily dangerous but were used in a dangerous matter in the robbery at issue. Where there was no evidence that a BB gun was loaded or used in a dangerous manner, the weapon fell in the third category and could be a "dangerous weapon" only if it was capable of being used as a bludgeon or dangerous weapon. Because the State failed to present any evidence of the physical characteristics of the BB gun, and introduced neither the gun nor a photograph of it, the evidence was insufficient to establish that it was a "dangerous weapon."

[People v. Fiala, 85 Ill.App.3d 397, 406 N.E.2d 931 \(3d Dist. 1980\)](#) Defendant handed a food store employee a note that said "This is a stick-up. Give the man in front of you the money." None of the eyewitnesses to the robbery observed a weapon. Immediately after the robbery, the defendant was chased and apprehended by the police. A gun was found where he was apprehended; however, the evidence suggested that during the chase defendant retrieved a gun from under his car seat. Thus, the circumstantial evidence was insufficient to prove that defendant possessed the gun during the robbery.

[People v. Bias, 131 Ill.App.3d 98, 475 N.E.2d 253 \(4th Dist. 1985\)](#) The Court reduced defendant's conviction from armed robbery to robbery because there was insufficient evidence to prove that a dangerous weapon was used. The only evidence as to the nature of the object pointed at the complainant's neck was

the complainant's testimony that it could have been a "very sharp fingernail."

[People v. Watkins, 94 Ill.App.3d 749, 419 N.E.2d 54 \(3d Dist. 1981\)](#) Defendant was convicted of armed robbery based on testimony that he had a "metal object" in his hand and pointed a knife with a tarnished blade at the victim. The defendant attempted to cross-examine the complainant about whether the "knife" could have been plastic. The State's objection to this line of questioning was sustained. In closing argument, the prosecutor told the jury that it "doesn't matter what the blade was made out of . . . [whether] it was metal[,] plastic . . . [or] marshmallow." The Court held that the trial judge erred by prohibiting inquiry into the nature and composition of the weapon, and that the error was compounded by the prosecutor's closing argument. The issue of whether a weapon is "dangerous" is for the jury, and the trial judge's rulings improperly restricted the jury and misled it as to the law.

[People v. Lovings, 275 Ill.App.3d 19, 655 N.E.2d 1152 \(2d Dist. 1995\)](#) The evidence showed that defendant entered the victim's car, announced that he had a gun and demanded the victim's money. No gun was ever displayed. Defendant was acquitted of armed robbery but convicted of robbery. On appeal, he contended that the evidence did not show that he threatened the victim with the "imminent use of force." The Court rejected this argument. The "threat of imminent force" requirement is satisfied "if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will." The Court held that a reasonable person would clearly be induced to part with his money against his will where a stranger claims to be armed and demands money.

Cumulative Digest Case Summaries §43-2

[People v. Hernandez, 2016 IL 118672 \(No. 118672, 5/19/16\)](#)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. [Ill. Const. 1970, art. I, §11](#). Under the "identical elements" test, a sentence will violate the clause if it is greater than the sentence for an offense with identical elements. If the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of armed robbery and sentenced to an extended Class X term of 40 years imprisonment. Defendant was armed with a heavy pair of tin snips and the State charged this as a "dangerous weapon, a bludgeon." Defendant eventually filed a post-conviction petition arguing that his sentence violated the proportionate penalties clause. The circuit court agreed and held that the armed robbery statute was facially unconstitutional because it carried a harsher penalty, a Class X sentence, than armed violence with a Category III weapon, which had the same elements but only carried a Class 2 sentence.

3. The Supreme Court reversed the circuit court, holding that armed robbery with a dangerous weapon did not have the same elements as armed violence with a category III weapon. A dangerous weapon for the purposes of armed robbery includes objects that may be used in a dangerous manner. By contrast, a category III weapon in the armed violence statute is specifically defined as a "a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." [720 ILCS 5/33A-1, 33A-2](#).

The tin snips used here qualified as a dangerous weapon under the armed robbery statute since they were heavy and large enough that they may be used in a dangerous manner. But while the tin snips might be capable of being used as a bludgeon, they are not typically identified as such and thus are not "of like character" to the bludgeon-type weapons included as category III weapons.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Dixon, 2015 IL App (1st) 133303 (No. 1-13-3303, 12/22/15)

Defendant was convicted of the armed robbery of a store owner while defendant or the co-defendant carried “a dangerous weapon that could be used as a bludgeon.” The trial court found that a surveillance videotape of the incident was sufficient to establish that a handgun carried by the defendants was capable of being used as a bludgeon.

A police officer testified that at first the store owner was not certain whether the defendants were armed during the offense, but after watching the surveillance video the owner concluded that defendants were holding a firearm. Although no weapon was introduced at trial, defendant told officers that he and his co-defendant had a BB gun which broke when they dropped it after leaving the store, and that they had thrown the item away.

The Appellate Court concluded that it was not required to defer to the trial court’s factual findings, and that the evidence was insufficient to satisfy the reasonable doubt standard.

1. To sustain a conviction for armed robbery, the trial court was required to find that defendant was armed with a dangerous weapon other than a firearm. Dangerous objects are divided into three categories, including objects that are dangerous *per se*, objects that are not dangerous *per se* but which were actually used in a dangerous manner, and objects that are neither dangerous *per se* nor used in a dangerous manner but which could be used in a dangerous manner. Here, the State argued that due to the weapon’s size and weight it could have been used as a club or bludgeon.

2. Normally, the trial court's factual findings are accorded deference on review and reversed only if against the manifest weight of the evidence. This rule of deference is based on the trial court’s superior position to weigh testimony, determine credibility, and resolve conflicts in the evidence. The court concluded that where the State presented no evidence concerning the weight or composition of the weapon and the trial court based the conclusion that the weapon was capable of being used as a bludgeon on its interpretation of a videotape, deference to the trial court’s factual findings was not required.

3. Where the State failed to introduce the weapon or any evidence that it was loaded or of such weight and composition that it could have been used as a bludgeon, defendant gave un rebutted testimony that the object was a BB gun that broke when it was dropped, and after viewing the videotape the Appellate Court could not determine whether the firearm could be used as a bludgeon, there was insufficient evidence to establish that the gun was capable of being used as a bludgeon. The conviction for armed robbery was reversed and the cause remanded for entry of a conviction for robbery.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

See also, **People v. Harris, 2015 IL App (1st) 133892 (No. 1-13-3892, 12/22/15)** (in the co-defendant’s appeal, the conviction for armed robbery was reversed and the cause remanded for entry of a conviction for robbery because the evidence failed to show that the weapon was capable of being used as a bludgeon).

People v. Fields, 2014 IL App (1st) 110311 (No. 1-11-0311, 2/11/14)

The State proved beyond a reasonable doubt that defendant was armed and hence guilty of armed robbery. The offense of armed robbery as charged in this case required proof that defendant possessed a firearm. **720 ILCS 5/18-2(a)(2)**. A firearm is defined by statute as any device designed to expel a projectile by action of an explosion or expansion or escape of gas. **430 ILCS 65/1.1**. The statute also contains several exceptions to this general definition, such as pneumatic guns, spring guns, paint ball guns, and B-B guns.

Although the statute contains exceptions, the term firearm is defined broadly, and contrary to defendant’s argument that the State must prove the existence of a firearm by direct or physical evidence, the unequivocal testimony of a witness that defendant possessed a gun is sufficient circumstantial evidence that defendant was armed. Here, a witness testified that defendant held a black gun at his side during the robbery. There was no evidence suggesting that the gun falls within any of the statutory exceptions to the broad general definition of a firearm. The State thus proved defendant guilty of armed robbery.

(Defendant was represented by Assistant Defender Shawn O’Toole, Chicago.)

[People v. Toy, 407 Ill.App.3d 272, 945 N.E.2d 25 \(1st Dist. 2011\)](#)

A person commits armed robbery when he or she commits a robbery, and (1) carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm; (2) carries on or about his or her person or is otherwise armed with a firearm; (3) during the commission of the offense personally discharges a firearm; or (4) during the commission of the offense personally discharges a firearm that causes great bodily harm, permanent disability or disfigurement, or death to another person. [720 ILCS 5/18-2\(a\)](#). Prior to January 1, 2000, the armed robbery statute provided only that the offender be armed with a dangerous weapon. The present statute makes clear that being armed with a “dangerous weapon” and a “firearm” are two different offenses under different subsections.

Defendant was charged with being “armed with a dangerous weapon, to wit: a gun.” The indictment did not specify under which subsection of the statute defendant was charged. Relying on [People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 \(2008\)](#), defendant argued that the State failed to prove that he was armed with a dangerous weapon because there was no evidence that the gun he carried was loaded or capable of being used as a bludgeon. The court rejected that argument, noting that **Ross** was charged under the previous version of the armed robbery statute. Proof of a dangerous weapon is no longer required where defendant is armed with a firearm. Relying on its analysis in affirming defendant’s aggravated criminal sexual assault conviction (see **SEX OFFENSES**, §46-2(a)), the court held that the evidence supported a finding that defendant was armed with a firearm.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

[People v. Watt, 2013 IL App \(2d\) 120183 \(No. 2-12-0183, 11/21/13\)](#)

The armed robbery statute was amended in 2000 to create substantively different offenses, armed robbery with a dangerous weapon other than a firearm, and armed robbery with a firearm. [720 ILCS 5/18-2\(a\)\(1\), \(a\)\(2\)](#).

Defendant was charged with armed robbery committed with a firearm. It was error for the court to instruct the jury that it could convict defendant of armed robbery based on his being armed with a dangerous weapon, where armed robbery with a dangerous weapon no longer exists under the current statute. Although the instruction was authorized by IPI, it does not correctly state the law and should no longer be given. The instructions should be modified to reflect the current state the law.

The Appellate Court affirmed, finding that the error did not amount to plain error.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

[Top](#)

§43-3

Aggravated Robbery

[People v. Kelley, 328 Ill.App.3d 227, 765 N.E.2d 1109 \(1st Dist. 2002\)](#) Under the circumstances of this case, the charge did not allege aggravated robbery as a lesser included offense of armed robbery. The charge did not allege the main outline of aggravated robbery, which requires proof that the defendant indicated verbally or by his conduct that he was armed with a firearm or dangerous weapon, where it alleged only that he used or threatened to use force to obtain property. In addition, because the trial judge explicitly found that the State had not satisfied the reasonable doubt standard on armed robbery, it would be “inappropriate” to remand the cause for a trial on an aggravated robbery that was never charged.

People v. Washington, 2012 IL 107993 (No. 107993, 2/17/12)

1. Prior to 2000, the Criminal Code provided that the offense of armed robbery is committed while armed with a dangerous weapon. Effective January 1, 2000, the statute was amended to create substantively distinct offenses based on whether the offender is armed with a dangerous weapon other than a firearm, or with a firearm. The sentencing enhancements of the amended version were held unconstitutional prior to the commission of the offenses in 2004 with which defendant was charged. [People v. Walden, 199 Ill.2d 392, 769 N.E.2d 928 \(2002\)](#); [People v. Moss, 206 Ill.2d 503, 795 N.E.2d 208 \(2003\)](#). That holding was overturned prior to defendant's trial in 2006. [People v. Sharpe, 216 Ill.2d 261, 839 N.E.2d 492 \(2005\)](#).

Based on its belief that the pre-amended version of the statute had come back into force with the decisions in [Walden](#) and [Moss](#), the State charged defendant with armed robbery under the pre-amended version of the statute with having committed the offense while "armed with a dangerous weapon, to wit: a firearm." Defendant made no objection to the indictment.

The court found that there was no variance, fatal or otherwise, between the proof at trial that defendant was armed with a gun and the charge that he was armed with a dangerous weapon. The State charged that defendant committed the offense with a dangerous weapon and was required to prove that he committed the offense with a dangerous weapon. The jury was instructed that it had to find that defendant was armed with a dangerous weapon to convict. The State proved that defendant committed the offense with a dangerous weapon—a gun.

2. The State charged defendant with the offense of armed robbery while armed with a "dangerous weapon, to wit: a firearm." It sustained its burden of proving that defendant used a gun as a dangerous weapon during the commission of the offense. A witness who had an unobstructed view of the weapon defendant had in his possession testified that it was a gun and also testified that defendant held the gun to his head. The jury could reasonably infer from this evidence that the defendant possessed a real gun.

The court distinguished [People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 \(2008\)](#). There, the evidence at trial was that defendant was armed with a small BB gun and there was no evidence of its weight or composition. As it could not be inferred from this evidence that the BB gun could have been used as a bludgeon, the evidence precluded a finding that the BB gun was a dangerous weapon.

3. Kilbride, C.J., dissented and Theis, J., joined the dissent. Only the sentencing enhancements of the amended statute were struck as unconstitutional. The substantive provision of the amended statute defining the elements of the offense remained intact. Defendant could not be prosecuted under the pre-amended version of the statute. Defendant could be convicted only of being armed with a dangerous weapon other than a firearm, or with a firearm. Because the State limited its argument on appeal to the dangerous-weapon prong of the statute, the issue was whether the State proved that defendant was armed with a dangerous weapon other than a firearm. There was no evidence at trial that defendant was armed with a non-firearm dangerous weapon.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

1. Whether a crime is a lesser-included offense is determined by the "charging instrument" test, which permits conviction of an uncharged offense if: (1) the instrument charging the greater offense contains the broad foundation or main outline of the lesser offense, and (2) the evidence rationally supports a conviction on the lesser offense. The latter question is to be considered only after it is determined that the uncharged crime is a lesser-included offense.

2. A charge may set forth the broad foundation or main outline of the lesser offense even if it does not contain every element of the lesser offense, so long as the missing element can be reasonably inferred. Here, defendant was charged with armed robbery for knowingly taking currency from the person or presence of the complainant by the use of force or by threatening the imminent use of force while being armed with a firearm. The complainant testified that defendant pointed a firearm at him, but no weapon was recovered and the State did not produce a firearm at trial.

The trial court found that the evidence was insufficient to establish that the item which defendant displayed was a firearm. However, the judge entered a conviction for aggravated robbery. Aggravated robbery occurs when a person commits robbery while indicating verbally or by conduct that he or she is armed with a firearm, even if it is later determined that there was no firearm.

The Appellate Court concluded that the armed robbery charge alleged the broad outline of aggravated robbery. The court found that the allegation that defendant took property “by the use of force or by threatening the imminent use of force” while armed with a firearm provided a basis to reasonably infer that the defendant indicated either verbally or by his actions that he was armed. Thus, aggravated robbery was a lesser included offense of armed robbery.

3. The court concluded, however, that the evidence was insufficient to justify a conviction for aggravated robbery. The only evidence showing that defendant indicated that he was armed was the complainant’s testimony that defendant displayed an item which the trial court found not to be a firearm. “The trial court did not find the victim’s testimony about a firearm credible enough to conclude that defendant frightened him with a firearm, and thus the evidence was also insufficient for aggravated robbery.”

4. The court reached the issue as second-stage plain error, finding that the entry of a conviction on a crime which is not a lesser-included offense violates the fundamental right to notice of the charges and affects the fairness of the trial and the integrity of the judicial process.

Defendant’s conviction for aggravated robbery was reduced to simple robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

[Top](#)

§43-4

Vehicular Hijacking

[People v. Johnson, 314 Ill.App.3d 400, 732 N.E.2d 100 \(1st Dist. 2000\)](#) Defendant was convicted of aggravated vehicular hijacking and armed robbery based on evidence that while he and a third party were test driving a car, defendant asked to see the title. Defendant later left the car, returned, displayed a revolver, and forced the owner out of the car. The Court reversed the conviction for armed robbery, finding that defendant did not use force or the threat of force to obtain the title. Armed robbery occurs where, while armed with a dangerous weapon, an individual takes property from the person or presence of another by use of force or by threatening the imminent use of force. The evidence showed that the owner voluntarily handed the title to the defendant, and that force was not used or threatened. The fact that defendant later used a weapon to obtain possession of the car did not link the use of force to the taking of the title, because the required level of concurrence between the use of force and the taking of property was not shown. “The fact that the defendant left the car after receiving the title separates the acquisition of the title from defendant’s subsequent conduct that formed the basis of his aggravated vehicular hijacking charge.”

[People v. McGee, 326 Ill.App.3d 165, 761 N.E.2d 741 \(3d Dist. 2001\)](#) Under [720 ILCS 5/18-3\(a\)](#), vehicular hijacking occurs where the defendant “takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force.” Adopting the reasoning of [People v. Cooksey, 309 Ill.App.3d 839, 723 N.E.2d 784 \(1st Dist. 1999\)](#), the court held that “immediate presence,” for purposes of the vehicular hijacking statute, means that the vehicle must be taken from “within the immediate control of the alleged victim at the time of the occurrence.” The offense of vehicular hijacking did not occur where the defendant assaulted the victim inside a residence and took the keys to her car, which was parked outside.

[People v. Robinson, 383 Ill.App.3d 1065, 892 N.E.2d 39 \(1st Dist. 2008\)](#) Vehicular hijacking occurs when a person takes a motor vehicle from the person or immediate presence of another by use of force or by threatening the imminent use of force. [720 ILCS 5/18-3\(a\)](#). Illinois case law holds that a person is in the “immediate presence” of a vehicle where at the time of the occurrence, she is either in the “immediate vicinity of the car” or has the vehicle within her “immediate control.” The complainant testified that while she was walking on the street “three houses away” from her parked car, the defendant seized her keys. The court concluded that the complainant was not in the “immediate presence” of her vehicle, and that the State therefore failed to prove defendant guilty beyond a reasonable doubt.

Cumulative Digest Case Summaries §43-4

[People v. Clark, 2016 IL 118845 \(No. 118845, 3/24/16\)](#)

1. A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

2. The State charged defendant with aggravated vehicular hijacking while armed with a firearm ([720 ILCS 5/18-4\(a\)\(4\)](#)) and armed robbery while armed with a firearm ([720 ILCS 5/18-2\(a\)\(2\)](#)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon “and will be treated as such.” The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

3. Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or (2) a dangerous weapon other than a firearm. [720 ILCS 5/18-2\(a\)\(1\), \(2\)](#); [720 ILCS 5/18-4\(a\)\(3\), \(4\)](#).

The Illinois Supreme Court held that it “would have to stretch plain meaning and common understanding beyond a semblance of reason” to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

4. Although defendant did not object to this error, the Supreme Court found that it was cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court’s actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court’s judgment reducing defendant’s convictions to vehicular hijacking and robbery and remanding the case for resentencing.

(Defendant was represented by Assistant Defender Gil Lenz, Chicago.)

[People v. Ligon, 2016 IL 118023 \(No. 118023, 2/19/16\)](#)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. [Ill. Const. 1970, art. I, §11. A](#) sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, “identical elements” test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as “a dangerous weapon, to wit: a bludgeon.” Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing [People v. Cummings, 375 Ill. App. 3d 513 \(1st Dist., 2007\)](#), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State’s argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. [720 ILCS 5/33B-1\(a\)](#). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant’s sentence as an habitual criminal has no effect on a court’s determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with “a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character.” [720 ILCS 5/33A-1, 33A-2](#).

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In [People v. Davis, 199 Ill. 2d 130 \(2002\)](#), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used as a bludgeon, it is not typically identified as such and thus is not “of like character” to the bludgeon-type

weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

In re Thomas T., 2016 IL App (1st) 161501 (No. 1-16-1501, 9/23/16)

The vehicular invasion statute requires the State to prove that a defendant "by force" entered or reached into the interior of a motor vehicle while it was occupied by another person with the intent to commit a theft or felony. [720 ILCS 5/18-6\(a\)](#). The term "force" is not defined in the statute. But Black's Law Dictionary defines force as "power, violence, compulsion, or constraint exerted upon or against a person or thing."

Here a taxi driver was sitting in his cab at a stop light. Defendant opened the front passenger door of the cab and took a pouch of money and taxi receipts that was on the front passenger seat. Defendant closed the door and fled with the pouch.

The court held that the evidence did not show that defendant entered the taxi and took the pouch by force. Although defendant did exert some authority over the taxi, that authority was exercised without a showing of strength, power, or violence. The door was unlocked and defendant did not physically damage the taxi. In opening the unlocked door, defendant did not exercise constraint or compulsion over the driver. The State thus failed to meet its burden.

Defendant's adjudication for vehicular invasion was reversed.

People v. Jackson, 2016 IL App (1st) 133823 (No. 1-13-3823, 10/27/16)

A person commits vehicular highjacking by taking a motor vehicle from the "person or the immediate presence of another by the use of force or by threatening the imminent use of force." [720 ILCS 5/18-3\(a\)](#) The Criminal Code defines "another" as "a person or persons . . . other than the offender." [720 ILCS 5/2-3](#). Thus, "another" can mean more than one person.

Noting a conflict in appellate authority, the court concluded that under the plain meaning of the vehicular hijacking statute only one count of vehicular highjacking can stand where the defendant takes a single vehicle from the immediate presence of several persons.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. McBride, 2012 IL App (1st) 100375 (No. 1-10-0375, 5/17/12)

1. Defendant was charged with aggravated vehicular hijacking under the pre-amended version of [720](#)

[ILCS 5/18-4\(a\)](#), which defined the offense as committing vehicular hijacking while “armed with a dangerous weapon.” At the time of the offense, the legislature had amended the aggravated vehicular hijacking statute to provide separate penalties for: (1) being armed “with a dangerous weapon, other than a firearm,” and (2) being armed with a firearm. Because case law had found the amendment to be unconstitutional under the proportionate penalties clause, however, the Appellate Court concluded that defendant was properly charged with the pre-amended version.

2. The evidence at trial showed that the defendant approached the complaining witness with a handgun which he held to the complainant’s forehead and which caused a bruise and a small amount of bleeding. The court found that there was sufficient evidence to allow the jury to find that the handgun was used as a dangerous weapon.

Under [People v. Ross, 229 Ill. 2d 255, 891 N.E.2d 865 \(2008\)](#), a weapon may be dangerous in one of three ways. First, weapons such as loaded guns are dangerous *per se*. Second, some objects which are not dangerous *per se* are considered dangerous because they were actually used in a dangerous manner during the offense. Third, some objects that are not dangerous *per se* are considered dangerous because they potentially could be used in a dangerous matter.

Under **Ross**, the trier of fact cannot presume that an object which has the outward appearance of a gun is loaded and operable, because such a presumption would shift to the defendant the burden of proving that the object was not dangerous. Instead, the State must prove dangerousness either by presenting evidence that the gun was loaded and operable or by showing that it either was used or was capable of being used as a bludgeon. Where the State fails to present evidence that a gun was loaded and operable, used in a dangerous manner, or capable of being used in a dangerous matter, as a matter of law it fails to prove dangerousness.

Because the handgun was actually used as a bludgeon and caused injury when the defendant forced it against the complainant’s forehead, the jury had sufficient evidence to find that the gun was dangerous. Therefore, defendant’s reasonable doubt challenge was rejected.

3. The court concluded, however, that the trial court committed reversible error when it gave a supplemental instruction concerning the definition of “dangerous weapon.” The trial court instructed the jury that the elements of aggravated vehicular hijacking include that the defendant was “armed with a dangerous weapon.” During deliberations, the jury sent a note to the trial judge asking for the definition of “dangerous weapon.” After consulting with counsel, the trial court gave a supplemental instruction combining the definition of “dangerous weapon” from the armed violence statute and a definition from Black’s Law Dictionary. Defense counsel objected to giving the definition from the armed violence statute.

The Appellate Court found that the supplemental instruction was erroneous because it informed the jury that a person is considered armed with a dangerous weapon if he carries a Category I, Category II, or Category III weapon, and defined a Category I weapon as a “handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semi-automatic firearm, or machine gun.” The court concluded that this instruction could have misled the jury into believing that the handgun used by the defendant was dangerous *per se*, thus relieving the State of its obligation to prove that the weapon was either loaded and operable, actually used as a bludgeon, or capable of being used as a bludgeon. Because the supplemental instruction could have relieved the State of its burden to prove that the gun was a dangerous weapon, reversible error occurred.

The court concluded that the error was not harmless where the only issue at trial was whether defendant was armed with a dangerous weapon, a finding of dangerousness could only have been based on a finding that the gun was actually used as a bludgeon, and the supplemental instruction allowed the jury to sidestep that issue simply because the weapon was a handgun.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. McCarter, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2864, 6/24/11)

A person commits vehicular hijacking when he or she takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force. [720 ILCS 5/18-3\(a\)](#).

Relying on [People v. Strickland, 154 Ill.2d 489, 609 N.E.2d 1366 \(1992\)](#), which reviewed the sufficiency of the evidence of a “taking” for purposes of armed robbery, the court held that a “taking” is not proved within the meaning of the vehicular hijacking statute where the defendant forces the victim to drive his own car to another location. While the victim may be denied a large measure of control over his vehicle, the vehicle is never removed from his actual possession.

Because there was no evidence that the victim was ever dispossessed of his car, even though the defendants forced the victim to drive his car to another location, the court reversed defendant’s conviction for aggravated vehicular hijacking.

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

[People v. Reese, 2015 IL App \(1st\) 120654 \(No. 1-12-0654, 9/24/15\)](#)

1. To obtain a conviction for aggravated vehicle hijacking, the State must show that the defendant committed vehicular hijacking while armed with a dangerous weapon other than a firearm. A person commits vehicular hijacking when he “takes” a motor vehicle from the person or immediate presence of another by the use of force or by threatening the imminent use of force.

Reiterating the holding in [People v. McCarter, 2011 IL App \(1st\) 092864](#), the court found that the accused “takes” a motor vehicle only if the victim is dispossessed of the vehicle. The court noted that the vehicular hijacking statute was written to closely track the language of the robbery statute, which has been interpreted as requiring that the victim be dispossessed of the property in question. The legislature is presumed to have known the judicial precedent defining the concept of “taking” for purposes of the armed robbery statute, and would have modified the language of the vehicular hijacking statute had it intended to enact a different meaning for the word “takes.”

2. The evidence showed that defendant escaped from custody, boarded a bus, threatened the driver with a shank, and ordered the driver to move the vehicle. After a few moments, the driver caused the bus to lurch and throw defendant forward. Defendant then fled.

The court acknowledged that defendant’s actions may have denied the driver a “measure of control” over the bus, but found that defendant did not take possession of the bus or remove it from the driver’s custody. In the absence of such evidence, the conviction for aggravated vehicular hijacking cannot stand.

3. The court noted that a defendant need not necessarily remove the victim from a vehicle in order to “dispossess” him of it. Whether the victim has been dispossessed in a particular case is a fact-specific inquiry which turns on the particular circumstances of each case.

Defendant’s conviction for aggravated vehicular hijacking was reversed.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

[People v. Wooden, 2014 IL App \(1st\) 130907 \(No. 1-13-0907, 8/8/14\)](#)

A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. [720 ILCS 5/18-3\(a\)](#). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. [720 ILCS 5/2-8](#). The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Vehicular hijacking thus falls within the definition of forcible felony.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

[Top](#)